

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Request of  
REM-Roseau, Inc. for a Waiver of  
FACT,  
Minn. Rules Parts 4565.2700 and  
4625.3701, Subpart 2.

FINDINGS OF  
  
CONCLUSION AND  
RECOMMENDATION

The above-entitled matter came on for hearing before  
Administrative Law  
Judge George A. Beck on Thursday, November 15, 1990, at 9:30 a.m.,  
in Courtroom  
No. 18, Fifth Floor, Flour Exchange Building in the City of  
Minneapolis,  
Minnesota. The record closed on the date of the hearing.

Charles Bisnett, Program Director, REM-Roseau, Inc., 208  
Second Avenue  
N.E., Roseau, Minnesota 56751, appeared on behalf of the  
Applicant, Rem-Roseau,  
Inc. Mary L. Stanislav, Special Assistant Attorney General, 500  
Capitol Office  
Building, 525 Park Street, St. Paul, Minnesota 55103, appeared on  
behalf of the  
Minnesota Department of Health.

This Report is a recommendation, not a final decision.  
The Commissioner  
of the Minnesota Department of Health will make the final  
decision after a  
review of the record which may adopt, reject or modify the  
Findings of Fact,  
Conclusions, and Recommendations contained in this Report.  
Pursuant to Minn.  
Stat. 14.61, the final decision of the Commissioner shall not be  
made until  
this Report has been made available to the parties to the  
proceeding for at  
least ten days. An opportunity must be afforded to each  
party adversely  
affected by this Report to file exceptions and present  
argument to the  
Commissioner. Parties should contact Sister Mary Madonna Ashton,  
Commissioner,  
Minnesota Department of Health, 717 Delaware Street S.E., PO  
Minneapolis,  
Minnesota 55414, to ascertain the procedure for filing exceptions  
or presenting  
argument.

#### STATEMENT OF ISSUE

The issue in this proceeding is whether or not the Applicant should be granted a waiver of Minn. Rules 4665.2700 and 4625.3701, subp. 2.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS\_QF FACT

1. The Applicant, REM-Roseau, Inc. is a 28-bed ICF/MR Class B group home located in Roseau, Minnesota. The Applicant presently has two residents with moderate retardation, ten residents with severe retardation, and fifteen residents with profound retardation. The Facility has tentative plans to decrease its number of residents at some time in the future.

2 . By letter dated July 6, 1990, the Applicant applied for a waiver of rules requiring commercial style stoves and dishwashers in its Facility. It seeks to replace a commercial style Jackson dishwasher with two residential dishwashers and it seeks to replace a large range with two family style stoves. The waiver is sought in order to permit residents to be taught food preparation and independent living skills in the kitchen. (Ex. 1).

3. Subsequent to the July 6, 1990 letter Mr. Bisnett spoke with James Loveland, Chief of the Engineering Services Section of the Department of Health about the request for waiver. At Mr. Loveland's request the Applicant provided more information in a letter dated July 11, 1990. The Facility noted in its letter that residents at REM would have one staff to one individual training while in the kitchen, that the residents would not be making meals for the entire home but would be preparing meals for themselves or a small group on weekends and that no individual living at REM would be permitted in the kitchen alone. (Ex. 2).

4. The waiver request was reviewed by members of the Licensing and Certification Administrative Committee (LCAC) of the Department of Health. The LCAC is composed of the managers in the Health Resources Division of the Department. The Committee voted to deny the waiver request on the grounds that alternative measures proposed by the Applicant were not equivalent to the rule requirements. By a letter dated August 2, 1990, Mr. Loveland advised Mr. Bisnett of the denial of the waiver request. The letter stated that the Committee felt that the two residential style stoves could not adequately support a food preparation operation for the group home and that a commercial dishwasher was necessary in the Facility to insure sanitary operation. (Ex. 3).

3) . Mr. Loveland suggested that the Facility could install a residential style stove in an area adjacent to the kitchen or might provide instruction in the use of microwave oven. (Ex. 3).

5. By letter dated August 13, 1990 the Applicant made -a timely request for a contested case hearing pursuant to Minn. Stat. 14.57. The letter noted that the Facility had no available space to install a "classroom" kitchen. (Ex. 4).

6. The rules require that dishwashers and stoves installed in a group home comply with the standards of the National Sanitation Foundation (NSF), an independent nonprofit organization.

7. The NSF has approved both ranges and dishwashers manufactured by Hobart which resemble residential equipment. (Ex. 5; Ex. 6). However, the Hobart stove costs approximately \$2,000 more than a residential style stove. The Applicant would incur costs of approximately \$6,000 more if it must purchase NSF approved stoves and dishwashers instead of residential appliances at its Facility.

8. The advantage of a commercial NSF approved stove is that it has fewer cracks and crevices which means less chance of food or grease buildup leading to a fire or health hazard. It is also made of stronger materials including less plastic which means there is less fire hazard due to worn parts and that larger equipment can be used on the stove. A commercial stove heats faster, which reduces the possibility of undercooking when large amounts of food are prepared.

9. An NSF approved dishwasher is superior because It cleans and sanitizes better, has stronger materials including less plastic, and is easier to clean which prevents transmission of infection. A residential style dishwasher would require two or more cycles to do the dishes at the Facility where a commercial style dishwasher could do the dishes in one shorter cycle. A residential dishwasher can also be used without the "sani-cycle" which brings up the heat.

10. The weight of the oven door on a commercial style stove is approximately two to three times that of a residential style stove. The commercial style stoves generally do not have timers.

II. Rule 34 of the Department of Human Services encourages group homes to teach independent living skills to its residents, such as how to prepare food. Federal guidelines also require residents to learn to function with as much independence as possible and cites as an example encouraging individuals to use simple appliances necessary for meal preparation such as a toaster, microwave oven, or for meal cleanup, such as a dishwasher. (Ex. A). The Individual Habilitation Plan (IHP) of one of the residents of REM-Roseau has as an objective cooking simple foods including the operation of the stove and the use of the dishwasher. (Ex. C).

12. The consulting dietitian at the Facility has advised it that two non-commercial ranges would meet meal preparation needs and that a residential dishwasher would adequately handle the dishes and utensils soiled at each meal. (Ex. B). The Facility serves breakfast to 27 individuals between 6:45 a.m. and 8:45 a.m. Twenty-one individuals are served meals from 11:00 a.m. to 12:30 p.m. Thirty-five individuals are served supper between 4:30 p.m. and 7:00 p.m. (Ex. 8).

13. The Department of Human Services recommended to the Facility that it purchased the residential style NSF approved dishwashers and stoves. (Ex. 7).

14. The Facility objects to the Hobart equipment because it believes that its residents could not open the heavier stove door and because of the added cost of the Hobart equipment. The Facility seeks to create a more homelike or normal kitchen and believes that perhaps one-half of its residents would be able to learn some cooking skills. The Facility believes that its residents would need to learn skills on equipment very similar to that which they would find outside the group home because they do not generalize well. The Facility has not been cited for failing to teach its residents independent living skills.

15. REM has -a 15-bed ICF/MR Facility in Buffalo, Minnesota which has a separate apartment containing cooking facilities for training residents.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Commissioner of Health and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and Minn. Rule pt. 4665.0600.

2. The Notice of and Order for Hearing in this matter was proper and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. The Applicant, REM-Roseau, Inc. has the burden of proving that it has satisfied the criteria for obtaining a waiver from the rules in question.

4. Minn. Rule 4665.0600 provides, as follows:

A supervised living facility may request in writing a waiver of a specific rule. The request for a waiver must cite the regulation in question, reasons for requesting the waiver, the period of time the licensee wishes to have the regulation waived, and the equivalent measures planned for protecting the health and safety of residents and staff. Waivers granted by the commissioner of health shall specify in writing the time limitation and required the equivalent measures to be taken to protect the health and safety of residents and staff.

5. Minn. Rule 4625.3701, subp. 2.C. provides that both ranges or stoves and dishwashing machines must comply with the applicable standards of the National Sanitation Foundation.

6. Minn. Rule 4665.2700 provides, in part, as follows:

Wherever the food service in a supervised living facility is limited to serving ten residents or less, or where the main meals of the day are not prepared in the facility, certain variances from the requirements may be granted by the commissioner of health. These variances may include, but not be limited to, substitution of certain domestic type equipment for commercial type.

7. That the language of Minn. Rule 4665.2700 does not preclude the granting of a variance in this case.

8. That the Facility has failed to prove that its proposed installation of residential style dishwashers and stoves will protect the health and safety of residents and staff in a manner equivalent to the requirements of Minn. Rule 4625.3701, subp. 2.

9. That the above Conclusions are arrived at for the reasons set out in the Memorandum which follows.

Based upon the foregoing Conclusions, the Administrative Law Judge makes

the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Health affirm the denial of the waiver requested by REM-Roseau, Inc.



Dated this        20th        day of November, 1990.

GEORGE A. BECK  
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Tape Nos. 9457 and 9458.  
No transcript prepared.

MEMORANDUM

REM-Roseau, Inc. seeks a waiver of a Department of Health rule that requires stoves and dishwashers purchased for a facility such as the Applicant to be approved by the National Sanitation Foundation, an independent nonprofit organization. The Applicant seeks to replace its larger commercial equipment with two residential type stoves and two residential dishwashers. The reason that the Applicant seeks to have the residential style appliances installed is so that it will be able to train those residents who are capable, to cook and use the dishwasher in order to prepare them for independent living. Both federal and state rules require the facility to encourage independent living skills but do not specifically mandate learning skills involving the stove or the dishwasher. The Facility objects to the Department's proposed substitute equipment, namely, the Hobart ranges or dishwashers on the grounds of cost. Additionally, it does not believe that its residents can handle the oven door because it is too heavy. REM-Roseau argues that compliance with the rule is an undue burden upon it.

At the hearing the Department argued that the language of Minn. Rule 4665.2700 precluded the granting of a waiver in this case. That rule permits a

variance of the kind sought here in a supervised living facility which has ten residents or less. The Department argues that the rule implies that a variance cannot be granted when there are more than ten residents in the facility. The testimony at the hearing indicated that the number of ten residents was picked because ten place settings can be washed in one cycle of a residential dishwasher. The language of the rule should not however, preclude the granting of a variance in this case. The general waiver rule set out at Minn. Rule 4665.0600 permits the waiver of any rule including 4665.2700 where appropriate. For example, one can envision a situation where a facility might be able to justify the use of domestic equipment for eleven residents.

In this situation, however, the Facility is serving up to 35 individuals per meal. In order to obtain a waiver it must not only show that its proposal is appropriate or cost effective, but it must also establish that equivalent measures to those contained in the rule will be taken to protect the health and

safety of residents and staff. The testimony of Mr. Loveland and Joanne Schultz presented reasons why NSF approved commercial type appliances are required by rule. The commercial appliances are superior to residential ones in terms of health factors and safety. They are made of stronger nontoxic materials, are easier to clean and perform their function faster and more effectively than residential equipment. As a result the danger of accidents such as from grease fires and of disease transmission are minimized. (Findings of Fact Nos. 8 and 9). REM-Roseau did not try to establish through testimony or argument that the residential equipment protected the health or safety of residents and staff as well as that required by the rule. It did indicate in its initial request for a waiver that the staff would have smaller pans and other cooking utensils to use, thereby reducing injury. However, that factor would seem to be far outweighed by the safety and health concerns presented by the Department in its testimony. The Applicant has failed to establish that its proposal to substitute residential appliances protects the safety and health of residents and staff as well as the NSF approved equipment.

The Facility does have a number of options in this case. It could simply add a microwave oven to teach skills to residents. It could install the NSF approved residential style equipment and seek reimbursement through the Medical Assistance Program. Both the Department of Health and the Department of Human Services believe that residents could be trained on the Hobart appliances. If it does downsize its resident population in the future, there may be another area in the Facility which could be used as a training kitchen with residential equipment. This has apparently been done in a REM Facility in Buffalo. Another possibility mentioned by the Department would be a cooking area at the local developmental achievement center.

The Facility's goals are admirable, namely, teaching residents to live independently and trying to normalize their living situation. They believe

that a home style residential kitchen will help accomplish this goal. The Department testimony points out, however, that the equipment rule is based upon important considerations also. That rule must be enforced absent a waiver which cannot be granted without an equivalent showing as to safety and health, a showing which the Facility has failed to make in this proceeding.

G.A.B.